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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ALLEN BLACK, Defendant and Appellant.	C041080 (Super. Ct. No. 01266)

APPEAL from a judgment of the Superior Court of Siskiyou County, Frank Petersen, Judge. (Retired judge of the Del Norte Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of Susan D. Shors and Susan D. Shors, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson and Jo Graves, Assistant Attorneys General, Stephen G. Herndon and

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of the Factual and Procedural Background and parts I through IV inclusive and part VI of the Discussion.

Wanda Hill Rouzan, Deputy Attorneys General for Plaintiff and Respondent.

A jury convicted defendant William Black of second degree murder with the use of a deadly or dangerous weapon (count 1; Pen. Code, §§ 187, subd. (a), 12022, subd. (b)(1); undesignated section references are to the Penal Code) and conspiracy to obstruct justice (count 3; § 182, subd. (a)(5)).[1] Sentenced to state prison, he raises numerous contentions, including a claim that the trial court "Erred in Denying [his] Motion that the Prosecution not be referred to as "'The People.'"

In the published portion of the opinion, we conclude the prosecution was properly undertaken in the name of "The People of the State of California." In the unpublished portion of the opinion we find no prejudicial error. We shall therefore affirm the judgment. However, we shall remand the matter to the trial court to correct an error in the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution case

At the beginning of February 2001, defendant was doing odd jobs for Robert Wolfe at Wolfe's home near Orleans in northern Humboldt County, California. On the evening of February 2, Wolfe drove defendant and Teresa Westfall to the trailer home of

[1] Count 2, charging conspiracy to commit murder (§ 182, subd. (a)(1)), was dismissed by the trial court on motion of the People.

Allie (Putsie) Davis, the victim, where defendant had been staying for a few days.[2] Davis lived on the downhill side of Highway 96, between the highway at the top of the hill and the Klamath River at the bottom. Wolfe and his passengers arrived around 9:15 p.m. Defendant had been drinking; his breath smelled of alcohol.

Forensic pathologist Dr. Susan Comfort testified that Davis, a 65-year-old Native American, was an alcoholic suffering from cirrhosis of the liver, hepatitis C, atherosclerosis, severe obstructive lung disease, and muscle wasting; he had recently had three small strokes. He could not have lived much longer in any event. Due to his condition, he could not have put up much of a fight against an attacker.

According to Westfall's testimony, she and defendant took about 12 cans of beer with them to Davis's home on the evening of February 2.[3] After they arrived, all three drank the beer and

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[2] Westfall, originally charged as a codefendant, pled guilty to one count of accessory to a felony and testified against defendant at trial.

[3] Westfall had a serious cut on her arm for which she had recently received stitches, antibiotics, and Vicodin. She took one Vicodin that night before going to bed, in addition to the beer she had drunk.

Westfall's testimony was not entirely clear or consistent, especially on cross-examination. At one point the trial court dismissed the jury and instructed the attorneys (including Westfall's attorney) that Westfall needed to be told to listen to the questions and "start answering" them. However, the prosecutor and Westfall's attorney told the trial court that her

Westfall cooked dinner. Later, Davis and defendant argued; Davis said defendant should leave Davis's home.

Sometime after midnight, Westfall went to bed. At one point as she went toward the bathroom, Davis reached for her but did not touch her. Westfall woke defendant and asked whether Davis would hurt them. Defendant said Davis never had before and urged Westfall to go back to sleep.

Later, Westfall heard Davis say, "You fuckers, get out." Waking up again, she felt an axe come down on her face; the flat side of the blade hit her lip, making it bleed. Davis was wielding the axe and saying, "Kill you fuckers."

Westfall jumped up and went to look at her face in a mirror. When she returned to the living room, she saw Davis and defendant wrestling next to the stove. Defendant took one of his boots in his hand and hit Davis in the face with the heel three or four times. At some point (either before or after Westfall left the room again and came back), defendant choked Davis and stomped on him three times in the chest and stomach. Westfall picked up the axe and handed it to defendant, saying, "This is what he hit me with." Throughout this time, Westfall did not see Davis hit defendant or hear Davis threaten defendant. Westfall heard defendant tell Davis loudly: "Go to sleep, old man."

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difficulties were genuine: she was not very bright and easily got confused.

As Westfall reached for her shoes, Davis grabbed for her foot. She shook loose and either kicked him two or three times in the groin and chest (as she told the police) or only kicked at him (as she testified at trial).

Westfall fell asleep on the couch. When she woke again, defendant was reading the Bible and crying. Later she heard the shower running. Defendant told her he had showered to clean up.

Defendant and Westfall left Davis's home around daybreak. Defendant later said to Westfall that they should have taken Davis's leather coats and other items on the way out.

Defendant and Westfall walked to the Somes Bar Store, where they tried to get a ride. Defendant called Karen Lowry from the store around 6:00 a.m. on February 3. He said Davis had chopped Westfall's face with an axe and she needed a ride to the hospital. Lowry asked where Davis was. Defendant said Davis was at home and had "got what he deserved." Lowry did not pick up defendant and Westfall. They remained at the store for several hours, until Benjamin Boykin picked them up.

Westfall told Boykin she wanted to go to her uncle's house, but defendant said no. Defendant asked to go to Eureka, but Boykin was only going as far as Orleans. Defendant said he and Davis had gotten into a fight and Davis had hit Westfall with an axe. Defendant did not mention that Davis was injured or ask Boykin to call the police.

After Boykin dropped defendant and Westfall off, they got a ride to the medical clinic in Hoopa. The doctor referred Westfall to the hospital in Arcata, two hours away, for further treatment.

Defendant called his parents from a store in Hoopa. He told them about the altercation and admitted Davis might be dead at his home in Somes Bar. Defendant's father told him to contact the authorities and get an ambulance.

Defendant did neither. Instead, he and Westfall hitchhiked rides to Arcata. At the hospital there, defendant talked to a deputy who also told him to contact law enforcement.

From there, defendant and Westfall went to visit friends of defendant who lived near the hospital. At their home, defendant told Westfall she should claim she had killed Davis in self-defense. When she tried to get away, defendant beat her up.

Defendant and Westfall went to stay at her grandmother's home in Eureka on the night of February 4. Defendant exchanged his boots for a pair belonging to Westfall's uncle. He said nothing about Davis while they were there.

While in Eureka, defendant called a former girlfriend, Anita Burns. Giving a false name, he asked to speak to Burns's husband, Joel. Defendant told Joel that he needed a ride and money.

The Burnses found defendant and Westfall at a gas station. Having seen a television news story about the incident, Anita

told defendant he was wanted; he did not seem surprised. He admitted pushing Davis down, kicking him in the stomach, and choking him. Anita advised him to turn himself in, but defendant said he had outstanding felony warrants. Joel gave defendant $10, then drove defendant and Westfall back to Arcata because defendant said they needed to look at Westfall's X-rays. However, they did not go back to the hospital.

Defendant's father picked up defendant and Westfall in Arcata, then contacted law enforcement. Defendant was arrested and confined in Siskiyou County Jail pending trial.

David Erwin, a fellow jail inmate, testified that defendant discussed his case with Erwin on the morning of February 8. According to Erwin, defendant said he had been charged with murdering his girlfriend's father or stepfather, an "old alcoholic."[4] Defendant and his girlfriend (Westfall) had run out of money and places to stay in Southern California, so they returned to Northern California. They stayed at Davis's place, where Westfall was welcome but defendant was not. Davis had told defendant to leave, but he had nowhere else to go.

One morning about 4:00 a.m., according to Erwin's account of defendant's story, Davis tried to molest Westfall on her way to the bathroom. Later, Davis told defendant to get out, then hit him in the arm with an axe. Defendant took the axe away

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[4] Westfall's mother had once been Davis's girlfriend.

from Davis and beat him to the floor, where he lay hurt and motionless. Not knowing whether Davis was alive or dead, defendant stepped outside to cool off. Coming back inside, defendant saw Westfall on top of Davis, hitting him. Defendant then hit Davis in the head with an axe, punched him in the face, and kicked him in the body. Subsequently, defendant and Westfall were in shock because Davis was obviously badly hurt; after defendant showered to get the blood off, he concluded Davis was dead. Defendant decided not to take any of Davis's property so it would not look like a robbery/murder. After hearing on the radio that he and Westfall were wanted, defendant decided against going to his family's home.

While in jail, defendant and Westfall corresponded. He called himself her husband in his letters. Defendant had said he wanted them to marry because if she were his wife she would not have to testify against him.

Dr. Comfort, the forensic pathologist, performed an autopsy on Davis three days after his body was found at his home. She concluded that he died of blunt force injuries to the chest and abdomen. His preexisting health problems did not contribute substantially to his death, although they would have impeded him from putting up any real resistance; his body showed no defensive wounds.

Davis had suffered extensive internal trauma in the chest and abdomen. Dr. Comfort could not draw blood from his body

because the veins had collapsed from blood loss. The abdominal cavity held a liter of blood (one-fifth the normal adult supply), spilled from the damaged organs. The kidneys were very pale, indicating significant blood loss and premortem shock. The pancreas was practically split in half. Many ribs were broken, causing lacerations of the heart and liver. The injuries to the heart were probably the most quickly fatal, but all the organ injuries would have eventually caused death.

In addition to the fatal internal injuries, the body showed multiple external injuries to the head and torso. The jaw was broken from a very forceful blow. The left side of the scalp had a complex wound, partly incised as if by an axe blade and partly crushed as if from a blunt object. There were abrasions and contusions to the right cheek, the nose, the forehead, the cheekbone, the chin, the right eye, and the neck--the last looking as though a necklace had been yanked, exerting pressure that could cause loss of consciousness in one-half minute and death in a minute or two. (A Native American necklace was found under Davis's body at the crime scene.)

The torso showed multiple overlapping injuries. Marks on the back were consistent with repeated blows from a rod-shaped object. A semicircular chest wound matched the shape of a heel from a pair of boots brought to the autopsy (the boots defendant had left at Westfall's grandmother's home). The bruising on the body could not have been caused by one or two blows or kicks,

but was consistent with repeated kicks or stomps delivered by a person of defendant's size wearing boots.[5]

Called pursuant to Evidence Code section 1101, subdivision (b), Albert Phillips, a longtime friend of Davis, testified that he met defendant at Davis's place a few days before the crime. On January 31 or February 1, 2001, the three were drinking rum at another friend's house; they left in a "party mood." Phillips, who was driving, pulled over because he was starting to feel the combined effects of the alcohol and a prescription medication; he told the others they would have to find a ride home. Without warning, defendant, sitting behind Phillips, began to pummel him in the head. Phillips got out of the car, trying to escape, but defendant pursued him and beat him, continuing even after he was defenseless.[6] The next day defendant returned Phillips's car and apologized, then asked Phillips to transport defendant's belongings to Davis's place. As Phillips waited for defendant to get his things, Davis

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[5] On cross-examination, Dr. Comfort acknowledged that many of the blows Davis suffered, including the fatal ones, could have been inflicted either by a man or a woman. She also acknowledged that the damage to all the internal organs could have resulted from two or three kicks.

[6] The defense sought to discredit this testimony through the opinion of a forensic toxicologist that the amount of alcohol Phillips admitted he had drunk could have given him a blood alcohol level of .18 percent, which could have impaired his ability to remember the details of an incident.

confided that he did not want defendant in his home. He did not or could not explain why he was allowing defendant to move in.

Defense case

The defense put on evidence designed to suggest that Westfall's consumption of alcohol and Vicodin just before the incident might have impaired her ability to perceive and remember events accurately. Margaret Lawson, a nurse practitioner who saw Westfall on February 2, 2001, for followup treatment of her infected arm, testified that the wound would have caused Westfall considerable pain; therefore Lawson wrote a refill prescription for 20 Vicodin, a strong painkiller which can cause drowsiness. She did not know, however, whether Westfall had filled that prescription.

Robert Wolfe testified that when he drove defendant and Westfall to Davis's home, Wolfe smelled alcohol in the truck; however, he did not know if the two had beer with them. Called by the defense, Westfall testified she could not recall having anything to drink before they arrived at Davis's place. However, a detective who had interviewed her testified that she said she had two or three beers beforehand. A forensic toxicologist opined that Westfall's blood alcohol level when the incident occurred could have been anywhere from .03 percent to .09 percent based on evidence in the record, and taking a Vicodin around midnight would have raised the effect of the alcohol by about .02 percent, as well as causing drowsiness.

The defense also put on evidence designed to impeach the credibility of jailhouse informant Erwin. Detective Rowe, who interviewed both defendant and Erwin at the jail, testified that he did not remember Erwin saying defendant was with Westfall in Southern California or that defendant hit Davis with an axe. Joseph LoGiudice, a Siskiyou County Jail inmate at the same time as defendant and Erwin, testified that defendant was quiet in jail and did not talk about his case, on LoGiudice's advice. The defense also called the custody manager at the jail to try to show that the time periods of defendant's and Erwin's confinement would have made it impossible for them to have conversed.

Rebuttal

Detective Rowe testified that defendant and Erwin were in the same unit of the jail long enough to have had a conversation.

Closing arguments

The prosecutor argued defendant was guilty of first degree murder. She acknowledged that Westfall was an accomplice as a matter of law, but asserted that Westfall's testimony matched the physical evidence. She did not refer to manslaughter at all.

Defense counsel argued defendant committed no crime whatever. He asserted the killing was justifiable homicide, either as self-defense, defense of another, or an attempt to

stop Davis from committing a forcible and atrocious felony. He attacked Westfall's credibility, asserting that her drug and alcohol consumption before the incident made her an unreliable witness and also that she was shading the truth to protect her deal with the prosecution. He reminded the jury of Dr. Comfort's testimony that two or three kicks from either a man or a woman could have caused the fatal injuries. However, he reiterated that whoever did the killing it was justifiable. He made no argument that the jury could convict on any lesser included offense.

The prosecutor on rebuttal stressed that the jury did not have to agree unanimously either that defendant was the direct perpetrator of the killing or an aider and abettor, so long as the jury unanimously found him guilty of unlawful homicide.

DISCUSSION

I

Defendant contends he "was denied his federal constitutional rights to due process of law and a full and fair trial by jury and a reliable verdict based on evidence found true beyond a reasonable doubt when the trial court instructed on intent to kill as an element of voluntary manslaughter and failed to help the jury understand malice." (Capitalization omitted.) We conclude that any error was invited or harmless and defendant's federal constitutional rights were not violated.

Background

The trial court purported to instruct the jury on all forms of unlawful homicide. As relevant to voluntary manslaughter, the court instructed with CALJIC Nos. 8.37 (manslaughter defined), 8.50 (murder and manslaughter distinguished), 8.72 (doubt whether murder or manslaughter), 8.74 (unanimous agreement as to offense--first or second degree murder or manslaughter), 8.42 (sudden quarrel or heat of passion), 8.43 (murder or manslaughter--cooling period), and 8.44 (no specific emotion constitutes heat of passion).[7] The court also gave

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[7] CALJIC No. 8.37 states: "The crime of manslaughter is the unlawful killing of a human being without malice aforethought. It is not divided into degrees but is of two kinds, namely, voluntary manslaughter and involuntary manslaughter."

CALJIC No. 8.50, as given, states: "The distinction between murder and manslaughter is that murder requires malice while manslaughter does not.

"When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, *even if an intent to kill exists*, the law is that malice, which is an essential element of murder, is absent.

"*To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done* [*in the heat of passion or upon a sudden quarrel*] [*or*] [*in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury*]." (Italics added.)

CALJIC No. 8.72 states: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was

unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder."

CALJIC No. 8.74 states: "Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also, if you should find [him] guilty of an unlawful killing, you must agree unanimously as to whether [he] is guilty of [murder of the first degree] [or] [murder of the second degree] [or] [voluntary] [or] [involuntary] manslaughter."

CALJIC No. 8.42 states: "To reduce an intentional felonious homicide from the offense of murder to manslaughter upon the ground of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion.

"The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up [his] own standard of conduct and to justify or excuse [himself] because [his] passions were aroused unless the circumstances in which the defendant was placed and the facts that confronted [him] were such as also would have aroused the passion of the ordinarily reasonable person faced with the same situation. [Legally adequate provocation may occur in a short, or over a considerable, period of time.]

"The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment.

"If there was provocation, [whether of short or long duration], but of a nature not normally sufficient to arouse passion, or if sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder, as I have defined it, the mere fact of slight or remote provocation will not reduce the offense to manslaughter."

CALJIC No. 8.11 (malice aforethought defined) as follows:

"Now, what's malice aforethought? You need a definition.

"Malice may be either express or implied. Malice is express when there is manifested an intention unlawfully to kill a human being.

"Malice is implied when the killing resulted from an intentional act, the natural consequences of the act are dangerous to human life, and the act was deliberately performed with knowledge of the danger to and with the conscious disregard for human life.

CALJIC No. 8.43 states: "To reduce a killing upon a sudden quarrel or heat of passion from murder to manslaughter the killing must have occurred while the slayer was acting under the direct and immediate influence of the quarrel or heat of passion. Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused, and sufficient time has elapsed for angry passion to end and for reason to control [his] conduct, it will no longer reduce an intentional killing to manslaughter. The question, as to whether the cooling period has elapsed and reason has returned, is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion, and for that person's reason to have returned."

CALJIC No. 8.44 states: "Neither fear, revenge, nor the emotion induced by and accompanying or following an intent to commit a felony, nor any or all of these emotional states, in and of themselves, constitute the heat of passion referred to in the law of manslaughter. Any or all of these emotions may be involved in a heat of passion that causes judgment to give way to impulse and rashness. Also, any one or more of them may exist in the mind of a person who acts deliberately and from choice, whether that choice is reasonable or unreasonable."

"When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

"The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

"The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental . . . state must proceed [*sic*] rather than follow the act. Must be before, rather than follow the act."

In addition, the court instructed pursuant to CALJIC No. 3.31: "In the crimes charged in counts 1 and 3 *and the lesser-included crimes of voluntary manslaughter and involuntary manslaughter*, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless the specific intent exists, the crime to which it relates is not committed.

"The specific intent required is included in the definition of the crimes as set forth elsewhere in these instructions." (Italics added.) The court then added: "When we get to murder, we will give you the definition of what the specific intent is at that time. Now, I don't think--*I will have to correct myself. I don't think voluntary manslaughter has a certain*

specific intent. But we will go through that with you. The others are surely specific intent crimes." (Italics added.)

However, so far as the record shows, neither party requested CALJIC No. 8.40, defining voluntary manslaughter, and the trial court did not give it.[8] CALJIC No. 8.40 states:

"[Defendant is accused [in Count[s] ____] of having committed the crime of voluntary manslaughter, a violation of § 192, subdivision (a) of [the] Penal Code.]

"Every person who unlawfully kills another human being [without malice aforethought but] either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code § 192, subdivision (a).

"[There is no malice aforethought if the killing occurred [upon a sudden quarrel or heat of passion] [or] [in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury].]

"The phrase, 'conscious disregard for life,' as used in this instruction, means that a killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a

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[8] The prosecutor filed a trial brief opposing any jury instructions on voluntary or involuntary manslaughter, asserting that no substantial evidence would support such instructions.

person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life.

"In order to prove this crime, each of the following elements must be proved:

"1. A human being was killed;

"2. The killing was unlawful; and

"3. The perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life; and

"4. The perpetrator's conduct resulted in the unlawful killing.

"[A killing is unlawful, if it was [neither] [not] [justifiable] [nor] [excusable].]" (CALJIC No. 8.40 (7th ed. 2003) pp. 362-363.)[9]

During deliberations, the jury sent the court a note reading: "On implied malice does all three conditions need to exist to determine that malice aforethought existed. CALJIC [No.] 8.11." The trial court responded, "Yes!"

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[9] This instruction was revised to incorporate the "conscious disregard for life" component in the wake of *People v. Lasko* (2000) 23 Cal.4th 101 (*Lasko*) and *People v. Blakeley* (2000) 23 Cal.4th 82 (*Blakeley*). Those decisions held that an unlawful killing in the heat of passion or in unreasonable self-defense where the defendant acted with conscious disregard for life was voluntary manslaughter; the intent to kill was therefore not a necessary element of that offense, as the previous version of CALJIC No. 8.40 had erroneously stated. (*Lasko, supra*, 23 Cal.4th at pp. 107-111 [heat of passion]; *Blakely, supra*, 23 Cal.4th at pp. 87-91 [unreasonable self-defense].)

Later, the jury sent the court a followup note reading: "As a whole we are having a problem reaching [a unanimous] decision at the point of whether malice aforethought was present. The problem is in Item No. 3 as to knowledge of the danger to human life. We would like clarifiation [*sic*] on Item 3 CALJIC 8.11 attached."

Discussing this note, the court and counsel agreed that the court could not improve on the language of the instruction. The court proposed to read other related instructions back to the jury (specifically, CALJIC Nos. 8.20, 8.30, and 8.31) or to ask the jury to reread those instructions. However, neither attorney endorsed those options. Defense counsel said: "*Well, the other instructions that would also apply include manslaugher* [*sic*]*, as well. I think it places undue and improper emphasis on it to read anything other than what the prosecution has requested; simply the language speaking for itself.*" (Italics added.) The prosecutor concurred. Therefore, the court simply told the jury: "[T]he language [of CALJIC No. 8.11] speaks for itself. We cannot improve upon it. So you have to follow the instructions as written, and I have no way of helping you other than it [']speaks for itself.[']"

The jury soon afterward returned its verdicts.

Analysis

Defendant contends the trial court erred prejudicially at two stages. First, the court failed to instruct on voluntary

manslaughter with CALJIC No. 8.40, which would have made clear (as the instructions given did not, according to defendant) that that offense can be committed with a conscious disregard for human life and does not necessarily require the intent to kill. Second, the court missed the opportunity to clarify matters when the jury asked about the meaning of "conscious disregard for human life" under CALJIC No. 8.11, an instruction which goes only to murder. In defendant's view, a properly instructed jury could reasonably have convicted him of manslaughter based on the finding that he lacked the intent to kill but acted with a conscious disregard for human life. Therefore, according to defendant, because the jury was not instructed it had that option, defendant was deprived of his federal constitutional rights to due process, a full and fair trial, and a reliable verdict based on evidence found true beyond a reasonable doubt. We are not persuaded.

The trial court must instruct sua sponte on lesser included offenses when the evidence raises a question as to whether all the elements of the charged offense were present and substantial evidence would justify conviction on the lesser offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*).) This duty exists regardless of the defendant's theories or trial tactics, and even if the defendant does not wish such instruction. (*Id.* at p. 162.) The trial court's duty is purely a matter of state law, however, not of federal

constitutional right. (*Id.* at p. 169.) Thus, the standard for reversible error where the trial court has omitted instructions on lesser included offenses or given them incompletely is not the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18) standard for federal constitutional error, but the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818) standard for state-law harmless error under article VI, section 13, of the California Constitution. (*Breverman, supra,* 19 Cal.4th at pp. 172-174.) That is, we "must examine the 'entire cause, including the evidence,' to determine if a 'miscarriage of justice' occurred." (*Id.* at p. 176, quoting Cal. Const., art. VI, § 13.)

Here, evidence existed on which the jury could have found voluntary manslaughter based on heat of passion or unreasonable self-defense, and the jury was instructed on those doctrines. Yet the trial court failed to give either the standard instruction defining voluntary manslaughter or any other that would have explained that it may be committed with a conscious disregard for human life rather than an intent to kill. We agree with defendant that this was error. However, on examining the full instructions given, the arguments of counsel, and the evidence, we conclude that the error did not prejudice defendant under the standard defined in *Breverman, supra,* 19 Cal.4th 142.

The trial court properly instructed the jury that to prove the crime was murder rather than manslaughter, the People had to show beyond a reasonable doubt that it was *not* committed in a

heat of passion or in unreasonable self-defense. (CALJIC No. 8.50.) The Supreme Court in *People v. Lasko, supra,* 23 Cal.4th 101 and *People v. Blakeley, supra,* 23 Cal.4th 82, made clear that the conscious disregard for human life will suffice for voluntary manslaughter where the defendant killed in heat of passion or unreasonable self-defense, but the Court did not change the law of voluntary manslaughter to eliminate those required predicate findings. By returning a verdict of second degree murder, the jury necessarily found that neither predicate to voluntary manslaughter existed. This verdict would not have changed if the jury had been told that it could find voluntary manslaughter based on conscious disregard for human life, because the jury would still have had to find heat of passion or unreasonable self-defense, and it did not so find. The combination of CALJIC No. 8.50 and CALJIC No. 8.11 (malice aforethought defined), together with the instructions on heat of passion and unreasonable self-defense, correctly stated the applicable law on these points. We must presume that the jury understood and followed the instructions as a whole. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

Furthermore, we do not see a reasonable probability defendant would have fared better had the missing instructions been given, because the evidence made the theory that he acted with a mere conscious disregard for human life in the heat of passion or unreasonable self-defense highly implausible. On

either Westfall's account or defendant's (according to informant Erwin), the elderly, fragile victim was rendered helpless long before defendant stopped beating, kicking, and stomping him. The victim suffered so many external wounds that the forensic pathologist could not count them, and so many internal injuries that any of several would inevitably have caused death. A reasonable jury could not have concluded under these circumstances that defendant did not have the intent to kill when he continued his attack on the victim after any possible heat of passion or unreasonable belief in the need to defend himself must have dissipated. Thus, the omitted instructions did not cause a miscarriage of justice.

Assuming the trial court erred by failing to "help the jury understand malice" in answering its questions about CALJIC No. 8.11, any error was invited. Defense counsel specifically urged the court not to reinstruct or reread instructions on manslaughter. In light of his closing argument, it is clear why counsel did not want the jury's attention called to manslaughter. Counsel argued for acquittal based on justifiable homicide; he also strongly implied Westfall was the actual killer. It would have contradicted both prongs of this strategy to remind the jury it could return a voluntary manslaughter verdict against defendant. By advising the court against "help[ing] the jury understand malice" in accordance with his strategy, defense counsel invited any error on this point.

(See, e.g., *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.)

Defendant contends that if trial counsel invited the trial court's error or waived the issue on appeal, this constituted ineffective assistance of counsel. As we have explained, there was no reasonable probability of a different outcome had counsel not invited the trial court's error. Therefore defendant's claim of ineffective assistance of counsel fails. (*People v. Frye* (1998) 18 Cal.4th 894, 979.)

For all the above reasons, defendant has failed to show grounds for reversal on this issue.

II

Defendant contends the trial court erred prejudicially by failing to instruct the jury that an aider and abettor to murder must have the specific intent to kill. Any error was harmless.

The trial court instructed the jury that defendant could be found guilty of murder as an accomplice and that the jury did not have to agree unanimously whether he was the perpetrator or an aider and abettor of the homicide.[10] As noted, defense

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[10] The trial court instructed on these points with CALJIC Nos. 3.00 (principals--defined) and 3.01 (aiding and abetting--defined). In addition, the court gave two special instructions, headed "3.01(A) [¶] Unanimous Agreement on Participation Not Required" and "3.01(B) [¶] Unanimity Regarding Fatal Blow(s) Not Required." The instructions as given read as follows:

"Principals defined. Persons who are involved in committing a crime are referred to as principals in that crime.

counsel insinuated in closing argument that Westfall, not defendant, was the actual killer, and the prosecutor reminded the jury it need not decide who actually killed the victim in order to convict defendant.

Each principal, regardless of the extent or manner of participation, is equally guilty.

"Principals include, one, those who directly and actively commit the act constituting the crime or, two, those who aid and abet the commission of the crime.

"A person aids and abets the commission of a crime when he or she, one, with knowledge of the unlawful purpose of the perpetrator and, two, with the intent or purpose of permitting, facilitating the commission of a crime, or three, by act or advice, aids, promotes, encourages or instigates the commission of the crime.

"Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

"Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. [¶] . . . [¶]

"You are not required to decide what the defendant's exact role was in the killing. As long as each of you is convinced beyond a reasonable doubt that the defendant is guilty of the crime of murder or manslaughter, as will be defined in these instructions, you need not decide unanimously by which theory he is guilty.

"You must not--you need not . . . decide unanimously whether defendant is guilty as an aider and abettor or as a direct perpetrator. [¶] . . . [¶]

"Where the conduct of more than one person or one particular blow caused the death of the victim, Allie Allen Davis, you are not required to unanimously agree that one particular blow or certain blows by either person led to the victim's death.

"It is not necessary for you to decide which person administered the fatal blows."

The court did not give CALJIC No. 3.02 (aider and abettor liability based on the "natural and probable consequences" doctrine). Nor did the court instruct the jury that an aider and abettor to murder must have the specific intent to kill. (See *People v. Lee* (2003) 31 Cal.4th 613, 624; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118 [if aider and abettor liability for murder not based on "natural and probable consequences" doctrine, aider and abettor must share murderous intent of perpetrator].) Thus, in defendant's view, the court failed to inform the jury about the mental state it needed to find in order to convict defendant of murder as an aider and abettor.

The trial court should have instructed as defendant says; however, the error was harmless because the jury could not reasonably have found that defendant was merely an aider and abettor. Viewed most favorably to defendant's position, the evidence showed that Westfall kicked the victim two or three times in the chest and groin and hit him a few times, a woman could have inflicted any blow the victim suffered, and his fatal injuries could have resulted from only two or three kicks. However, Westfall denied inflicting any blows on the victim, and the jury could have found that testimony credible.

But even if the jury disbelieved Westfall's denial, the evidence showed that the victim suffered far more internal and external injuries than just a few blows could have caused, and

even by defendant's own admission (to informant Erwin and to the Burnses) he personally inflicted numerous blows. In addition, an injury to the victim's chest matched the shape of defendant's boot heel, but there was no evidence Westfall was wearing boots on the night of the crime. (Thus, defendant's later attempt to dispose of his boots by swapping them for those of Westfall's uncle is highly probative of consciousness of guilt.) Moreover, Dr. Comfort testified that the number and force of the blows was consistent with a person of defendant's size stomping on the victim with boots; by implication, that evidence was inconsistent with the premise that Westfall was the sole or main attacker. Finally, the evidence of defendant's conduct after the crime--in particular, his attempts to get Westfall to claim she killed the victim in self-defense, and then to prevent her from testifying against him by marrying her--is easier to reconcile with the conclusion that defendant was the actual perpetrator than with the conclusion that he merely aided and abetted Westfall.

On this record, we conclude that the failure to instruct that an aider-and-abettor must have the intent to kill is harmless beyond a reasonable doubt. (*People v. Odle* (1988) 45 Cal.3d 386, 414; *People v. Dyer* (1988) 45 Cal.3d 26, 64.)

III

Defendant contends insufficient evidence supports his conviction on count 3 (conspiracy to obstruct justice) because

all the alleged overt acts merely show efforts to escape capture for the homicide, which is not properly chargeable as a separate offense. In effect, defendant says, he was punished for exercising his constitutional right to remain silent rather than confess. We disagree.

Background

Section 182, subdivision (a)(5), makes it a felony for two or more persons to conspire, inter alia, "to pervert or obstruct justice, or the due administration of the laws." The first amended information charged defendant with committing the following overt acts "pursuant to and for the purpose of carrying out the objectives and purposes of the aforesaid conspiracy [to pervert or obstruct justice or the due administration of laws]:

"1. After inflicting great bodily injury and/or fatal blows to Allie Davis, defendant WILLIAM ALLEN BLACK, and Teresa Ann Westfall . . . left the home of Allie Davis.

"2. Defendant WILLIAM ALLEN BLACK and Teresa Ann Westfall . . . talked to many people without disclosing that Allie Davis had been severely injured by them.

"3. Defendant WILLIAM ALLEN BLACK and Teresa Ann Westfall . . . talked to a member of law enforcement but did not disclose that Allie Davis had been severely injured by them.

"4. Defendant WILLIAM ALLEN BLACK refused to contact or otherwise reveal to law enforcement that Allie Davis was

severely injured and/or dead because he had outstanding felony warrants for his arrest."

Along with standard CALJIC conspiracy instructions, the trial court instructed the jury as to this offense: "Anyone who conspires to unlawfully hinder, delay, or obstruct any law enforcement officer in the discharge or attempted discharge, or the performance of, their [*sic*] official duty, for example to investigate or enforce the criminal laws, is guilty of conspiracy to obstruct justice. . . .

"In order to prove the defendant guilty of conspiracy to obstruct justice, in addition to proof of the unlawful agreement and specific intent to commit the crime of conspiracy to obstruct justice, there must be proof of the commission of at least one of the acts alleged in the information in count 3 to be an overt act. It is not necessary to the guilt of the defendant that defendant personally committed an overt act, if he was one of the conspirators when the alleged overt act was committed.

"Although the prosecution must prove a specific intent to agree to commit the crime of conspiracy to obstruct justice, followed by an overt act committed in this state by one or more of the conspirators for the purpose of accomplishing the object of the agreement, the prosecution does not need to prove an evil or corrupt motive.

"It is sufficient if the evidence shows a specific intent to do an act or acts which constitute the obstruction of justice."

The prosecutor argued this count was proven by the fact that defendant and Westfall talked to at least three people after the crime without disclosing that they had severely injured the victim, the fact that they spoke to a deputy at the hospital without making that disclosure, and the fact that defendant rejected Anita Burns's advice to turn himself in because he had outstanding felony warrants. The prosecutor also pointed out that defendant and Westfall spent several days after the crime traveling throughout the area rather than immediately turning themselves in, despite the urging of Burns and defendant's parents.

Analysis

Defendant asserts that acts to conceal a conspiracy or its object cannot be charged as overt acts in furtherance of the conspiracy, relying on *Grunewald v. United States* (1957) 353 U.S. 391. However, *Grunewald v. United States* did not involve a conspiracy to obstruct justice. (*Id.* at p. 393.) In such a conspiracy, the attempt to conceal a completed crime from law enforcement is not an attempt to conceal the conspiracy or its object. The conspiracy alleged is not the conspiracy to commit the original crime. Rather, it is a separate and independent attempt to prevent, hinder, or delay law enforcement in carrying

out its duties. (§ 182, subd. (a)(5).) "'[A]nything done by a person in hindering or obstructing an officer in the performance of his official obligations'" may properly be charged as an overt act in furtherance of such a conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 387, quoting *Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 59.)

Defendant also asserts that the alleged overt acts in this count were "not 'overt' at all but 'covert' omissions"--i.e., mere "instances of non-action" which cannot fall within the definition of an overt act as "'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.' [Citations.]" (*People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8.) This amounts to an argument that the facts alleged in the information did not constitute a public offense. (§ 1004.) But defendant did not demur to the information or move for arrest of judgment on that basis. His failure to do so waives the objection. (§§ 1002, 1012.)

In any event, defendant's point lacks merit. Defendant did not merely keep silent or fail to act: as alleged in the information, he affirmatively misled those people to whom he spoke after the crime (including a law enforcement officer) without disclosing the victim's severe injury, and he affirmatively spurned pleas to surrender. Those affirmative

acts hindered and delayed law enforcement in carrying out its duty to discover and investigate the killing.

Finally, defendant's assertion that he was punished for exercising his constitutional right to remain silent is unfounded. The information did not allege as an overt act in support of count 3 that defendant refused to admit his crime to the police after his arrest.

IV

Defendant contends his sentence on count 3 must be stayed pursuant to section 654 because the homicide and his flight from the crime scene are part of the same course of conduct. He is wrong.

The trial court ruled that defendant's two offenses deserved separate and consecutive sentences because "the crimes and objectives were predominantly independent and they were committed at different times and places." This finding was correct.

Multiple punishment is appropriate notwithstanding section 654 if a defendant had multiple though simultaneous objectives or consecutive and therefore separate objectives. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216.) A trial court's finding with respect to section 654 will be upheld unless unsupported by the evidence. (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.)

Defendant describes his crime in count 3 as "the flight from the scene of the homicide." As explained above in part III, however, he did not just flee, but sought to impede and delay the police for days afterward. Furthermore, that objective was logically independent of his objective in count 1. Not every murderer seeks to frustrate the discovery of his crime.

Defendant has shown no section 654 error.

V

Defendant contends the trial court erred prejudicially by denying his pretrial motion to preclude the prosecution from being called, "The People" or "The People of the State of California." According to defendant, this appellation violates criminal defendants' state and federal constitutional rights to fair trial by jury and to due process. We conclude that this contention, although raised increasingly often, lacks merit. California statutes mandate that prosecutions be conducted in the name of "The People of the State of California," and defendant has failed to show that the applicable statutes are unconstitutional on their face or as applied here.

Section 684, originally enacted in 1872, provides: "A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense." Similarly, Government Code section 100, subdivision (b), provides: "The style of all process shall be

'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority."

Because statutory law mandates that prosecutions shall be conducted in the name of the "The People," defendant's challenge can succeed only if he can show that the statutes are unconstitutional on their face or as applied. In considering a facial constitutional challenge to a statute, a reviewing court must uphold the statute unless its unconstitutionality plainly and unmistakably appears; all presumptions favor its validity. (*Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253-255.) The challenge can succeed only if the statute "'inevitably pose[s] a *present* total and fatal conflict with applicable constitutional prohibitions.' [Citation.]" (*People v. Gallegos* (1997) 54 Cal.App.4th 252, 262.)

Defendant asserts that calling the prosecution, "The People" violates the federal and state constitutional guarantees of a fair trial by jury and due process of law. (U.S. Const., 5th, 6th, & 14th Amends.; Cal. Const., art. I, §§ 15 & 16.) However, he fails to cite any authority so holding. He merely notes that most other states style the prosecution, "The State" or "the Commonwealth" and that the federal district courts style the prosecution "The United States," then concludes: "Such consensus indicates California's practice violates due process." On the contrary, even if California's practice were unique, that

fact would not tend to prove a constitutional violation. (See, e.g., *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1515-1516.)

The substantive aspect of the federal Due Process Clause protects individuals from being deprived of fundamental liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to a compelling state interest. (*Reno v. Flores* (1993) 507 U.S. 292, 301-302.) Assuming without deciding that defendant is asserting an interest which is entitled to protection by *substantive* due process, defendant has shown no unfairness. The signatories to this opinion have collectively served many decades on the trial and appellate benches and have participated in the adjudication of hundreds upon hundreds of criminal cases. (See *People v. Bush* (2001) 88 Cal.App.4th 1048, 1053.) We are not aware of a single instance in which the fact that a prosecution was brought in the name of "The People" has had any influence whatsoever on the decision of a jury with respect to a defendant's guilt or innocence. There is simply no unfairness. For that reason, defendant's facial challenge to this procedure, based on a lack of *procedural* due process fails as well. Under the procedural aspect of the federal Due Process Clause, the states are generally free to regulate the procedures of their courts in accordance with their own concepts of policy and fairness, unless a state procedure violates some fundamental principle of

justice. (*Patterson v. New York* (1977) 432 U.S. 197, 201-202.) No fundamental principle of justice is violated here.

Defendant purports to rely not only on the federal constitutional right to due process but also on California's parallel constitutional right. (Cal. Const., art. I, §§ 15, 16.) There is no state constitutional infirmity in prosecuting criminal cases in the name of "The People of the State of California."

Finally, defendant makes no attempt to demonstrate by record citation how his own trial fell short of due process because the prosecution was called, "The People." Thus, assuming he intends an as-applied constitutional challenge to section 684 and Government Code section 100, subdivision (b), we reject it summarily.

VI

We note that the abstract of judgment contains an error. It describes count 1 as section "187(a)(5)," which does not exist. On remand the trial court is directed to correct the abstract of judgment to show count 1 as section "187(a)" and to furnish a certified copy of the abstract of judgment to the Department of Corrections.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to correct the abstract of judgment as indicated in part VI of the Discussion.

SIMS, J.

We concur:

SCOTLAND, P.J.

DAVIS, J.